No. 12780

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HENRY LEE YOUNG,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

HONORABLE PEIRSON M. HALL, *Judge*

BRIEF OF APPELLEE

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JURISDICTION

The jurisdiction of this court to review the District Court's action is set out on page one of the Appellant's Brief.

STATEMENT OF CASE

The indictment in this case contains two counts.

Count I charges that the defendant forged a United States Treasury Check in violation of Section 73, Title 18, U.S.C., as the same existed prior to the revision and amendment of September 1, 1948. Count II charges that the defendant uttered as true a forged United States Treasury Check in violation of the same section as set out in Count I. The same check was involved in both counts of the indictment. The defendant entered a plea of guilty to both Counts I and II. At the time of the arraignment and plea and imposition of sentence defendant was represented by counsel of his own choosing, Mr. Robert A. Yothers, an experienced and able attorney in the city of Seattle, Washington.

Despite the impassioned and prejudicial statements set out in the appellant's brief on page two, the Honorable Lloyd L. Black carefully considered the presentence investigation and all of the statements made by the defendant and his counsel on the defendant's behalf. After very careful consideration the court imposed a sentence of four and one-half (4½) years imprisonment on Count I, and four and one-half (4½) years imprisonment on Count II to run consecutive to make an aggregate of nine (9) years. The maximum sentence which could have been imposed is ten (10) years imprisonment on each count.

As the record shows in this case the appellant, Henry Lee Young, was one of the ring leaders of a group of some ten to fourteen individuals who had made a practice and a business of stealing United States Treasury Checks from the mail, forging the name of the payee thereon and cashing the same. By the appellant's own statements the ring had defrauded the United States out of between $30,000 and $40,000 by such unlawful practices. There is nothing in the record to indicate that the appellant is illiterate, or that he was destitute at the time of committing the acts to which he plead guilty. The appellant was not arrested until quite sometime after the crimes were committed due to the fact that it takes several months for United States Treasury Checks to be processed and returned to the last endorser after a forgery has been discovered.

SPECIFICATION OF ERROR

Specification of errors relied upon by appellant are set out beginning on page three of appellant's brief.

ARGUMENT

I.

In specification of error No. 1 the appellant contends that the District Court erred in holding that

the application under Section 2255 of Title 28, U.S.C. was premature.

In the second specification of error the appellant contends that the crime of forging and the crime of uttering, as charged on Counts I and II, were one and the same offense and therefore, it was error for the court to impose a separate sentence on each count.

Specifications of error 1 and 2 are more than fully answered in the opinion rendered by the Honorable Peirson M. Hall, United States District Judge, who presided at the hearing in the District Court upon the appellant's motion to vacate the judgment and sentence under Section 2255 of Title 28, U.S.C. Since this is an appeal in forma pauperis and there are only a limited number of transcripts available in the Court of Appeals, Judge Hall's opinion is set out in full as follows: (Tr. 92).

> "This is a proceeding under Title 28 U.S.C., Sec. 2255.
>
> On August 29, 1948 an indictment in two counts was filed against the defendant, charging him in Count I with forging the name of the the payee to a U. S. Government Check on or about June 17, 1947, and in Count II with uttering and passing the same check as true, on or about the same date. On September 10th, the defendant, then being represented by counsel, pleaded guilty to both counts. The matter was referred to the probation department and after

report thereon, the defendant on November 12, 1948 was sentenced by the Honorable Lloyd L. Black, as Judge of this Court to four and one-half years and to pay a fine in the sum of $1,000.00 on Count I of the indictment, and to four and one-half years and to pay a fine in the sum of $1,000.00 on Count II of the indictment, with the specific provision that 'the imprisonment on Count II shall run consecutive to the sentence of imprisonment on Count I herein, to make an aggregate of Nine (9) years.'

The petition, filed in handwritten duplicate, requested the Court to appoint 'competent and experienced counsel to aid and represent the defendant.' No showing of poverty or inability to employ counsel of defendant's own choosing was made or attempted to be made. The Court nevertheless appointed Clarence A. Lirhus, Esq., a competent and experienced member of this bar to represent defendant, transmitted to him the copy of the petition, made available to him the files and records of the case, and after notice to the United States Attorney, set the matter down for hearing in open court. There appeared to be no need for the presence of the defendant, and his presence was not requested, so he was not present except by appointed counsel.

The petition does not attack the sentence on Count I. It attacks Count II only. While the petition is long, the substance of the attack on Count II is that it charges the same offense as contained in Count I, and that thus the defendant is put in double jeopardy for the same offense.

Before considering the merits of petitioner's claim it is first necessary to determine whether or not the petition is timely filed, i.e., whether or not the petitioner who has not yet begun to serve the sentence which he is attacking, can file

a motion at this time under the provisions of 28 U.S.C., Sec. 2255.

The text of the pertinent provisions of that section are as follows: (Italics supplied)

> 'A *prisoner in custody under sentence* of a court established by Act of Congress claiming the right to be released upon the ground that *the sentence* was imposed in violation of the Constitution or laws of the United States, or that the Court was without jurisdiction to impose *such sentence*, or that *the sentence* was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed *the sentence* to vacate, set aside or correct *the sentence.*
>
> A motion for such relief may be made *at any* time.'

At first blush, it would appear that the words 'at any time' occurring in the second paragraph of the section would permit the filing of such petition prior to the commencement of the service of the sentence which is under attack. But those words must be read in connection with the first paragraph of the section, and with particular reference to the use of the words '*in custody* under sentence' and the words '*the* sentence,' and '*such* sentence.' When this is done it becomes apparent that the person must be in custody under *the sentence which is being attacked.* That being so, the petition is premature and must be disallowed on that ground alone. Moreover, in this connection, it must be assumed that Congress intended the section to be read in the light of the practicalities of the administration of the law. Surely Congress did not intend to burden the Courts with the grant of a new trial even on limited issues to every person in the federal prison system who has had imposed upon

him consecutive sentences. To permit such motion to be filed at any time would permit exhaustion of remedy by appeal, and then let a convicted prisoner start all over again. Criminals who might be serving one sentence in one jurisdiction, and be convicted or plead guilty to another and entirely unrelated offense in another jurisdiction, could thus have not only their appellate remedy, but begin a new ride through the Courts, with the possibility that they may never begin the service of the sentence under attack, either due to the intervention of death or from some other cause.

It should be noted that Section 2255 of U.S.C., Title 28, provides further that 'an application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion, pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief by motion to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.'

Thus, the section makes the motion provided for therein a condition prerequisite to an application for a writ of habeas corpus. The law is clear that a writ of habeas corpus will not lie to test the legality of a sentence under which the prisoner is not then being held.

McNally v. Hill, (1934) 293 U.S. 131, at 139, 79 L. Ed. 238, 55 S. Ct. 24;

Holiday v. Johnston, (1940) 313 U.S. 342, 85 L. Ed. 1392, 61 S. Ct. 1015;

Demaurez v. Squire, (C.C.A. 9-1941) 121 Fed. (2d) 960.

Since the motion is contemplated as a pre-

liminary step necessary before an application for a writ of habeas corpus will lie, it would seem logical that the motion likewise should be limited to attack on that sentence under which the prisoner was then serving time.

In any event the contentions of the petitioner are groundless on their merits. It is definitely settled in this Circuit by *Demaurez v. Squire*, 121 Fed. (2d) 960; certiorari denied 314 U. S. 661; rehearing denied 314 U.S. 714, that 'The offense of forging and the offense of uttering a forged writing in violation of 18 U.S.C.A. Sec. 73, supra, are separate and distinct offenses.'

Nor is there any merit to the petitioner's contention that the government has carved out two serious offenses with severe punishment over a trivial check of $21.30. The defendant admitted that he and a group of others had over a period of some time been engaged in stealing U. S. Treasury Checks from post office boxes. He first began his depredations among the residences of his own race. He and each of the others were vague about the total amount, but it is evident from the record that the total was in the neighborhood of from thirty to forty thousand dollars. They were professional thieves. They forged social security cards, liquor permits and other things to aid in the uttering of the checks. The defendant had had no legitimate employment for some years prior to his arrest. That he well knew the difference between forging and uttering is shown by the fact some of them stole the checks and others passed and uttered them. The defendant admits his share of such loot was several thousand dollars. His police record covers at least thirteen arrests, and at the time of his sentence some cases were pending in the State Courts of Washington, which were dis-

missed after the sentence here. As a crowning affront to the law, the defendant participated in the proceeds of a Treasury Check in a sum in excess of $2400.00 which was stolen either by the defendant or one of his confederates, while both were out on bail after their arrest on the within indictment. Had he been charged with every crime he admitted committing, his sentence could have exceeded a lifetime. In view of this, his effort to make it appear that he has been over-punished for a trivial check assumes the proportions of being preposterous.

The motion is denied.

DATED: at Seattle, Washington, this 23d day of September, 1950.

/s/ Peirson M. Hall
/t/ Peirson M. Hall
U. S. District Judge."

As will be noted in the record, Judge Black very carefully considered all aspects of the appellant's case prior to imposing sentence. The Honorable Peirson M. Hall carefully reviewed the action taken by the Honorable Lloyd L. Black and wholeheartedly endorsed Judge Black's disposition of the appellant's case. It will therefore be seen that two eminent District Court Judges have carefully reviewed this matter and have arrived at the same conclusions.

The only additional authorities which might be added at this time is the decision of this court rendered in the case of *Hastings v. United States*, 184 F. (2d) 939, wherein this court stated:

"A proceeding under Sec. 2255 is intended as a substitute for habeas corpus. The contentions here urged would not be considered in a habeas corpus proceeding. We agree with the opinion of the Fourth Circuit in *Taylor v. United States*, 4 Cir., 177 F. (2d) 194, which states, at page 195, 'Prisoners adjudged guilty of crime should understand that 28 U.S.C.A., Sec. 2255 does not give them the right to try over again the cases in which they have been adjudged guilty. Questions as to the sufficiency of the evidence or involving errors either of law or of fact must be raised by timely appeal from the sentence if the petitioner desires to raise them. Only where the sentence is void or otherwise subject to collateral attack may the attack be made by motion under 28 U.S.C.A., Sec. 2255, which was enacted to take the place of habeas corpus in such cases and was intended to confer no broader right of attack than might have been made in its absence by habeas corpus.'

The judgment is affirmed."

II.

In specification of error No. 3 the appellant contends that the court permitted itself to be swayed by obvious prejudice.

In specification of error No. 4 it is the appellant's contention that the District Court erred in affirming Judge Black's opinion, since this action prohibits the appellant from exercising his right to apply for parole.

It is submitted that neither specification of error No. 3 or No. 4 are matters which this court may review with propriety.

Appellant's vicious attack upon the late Lloyd L. Black in claiming that he was swayed by passionate prejudice is entirely unwarranted.

Those of us who practiced before Judge Black for many years know that there was not a drop of prejudice in his entire makeup. No one could ever leave Judge Black's court room without the firm conviction that the Judge was absolutely fair and impartial, and that he could find some good in every person no matter how bad their record might appear.

In regards to the appellant's fourth specification of error the rules regarding parole were well known to the Honorable Lloyd L. Black, and he undoubtedly imposed the two sentences of four and one-half years to run consecutive well knowing that he was depriving the appellant of his right to ask for parole until he had served a year and one-half of his second sentence. It should also be pointed out that the court could have imposed a sentence of ten years on each count to run consecutively, thereby depriving the appellant of his right to ask for parole until he had served three and one-third years on the second count.

CONCLUSION

It is the appellee's contention that neither Judge Lloyd L. Black nor Judge Peirson M. Hall committed error in the disposition of the appellant's matter. It is respectfully requested that the Court of Appeals for the Ninth Circuit affirm the opinion rendered by the Honorable Peirson M. Hall.

Respectfully submitted,

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